

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 10 May 2018**

**BALCA Case No.:** 2018-TLN-00090  
**ETA Case No.:** H-400-17320-213639

*In the Matter of:*

**BMC WEST LLC,**  
*Employer.*

Appearance: Robert Kershaw, Esquire  
The Kershaw Law Firm, PC  
Austin, Texas  
*For the Employer*

Nora Carroll, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: Larry S. Merck  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case arises from BMC West, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny twelve applications<sup>1</sup> for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);<sup>2</sup> 20 C.F.R. § 655.6(b).<sup>3</sup> Employers seeking to utilize this program must apply for

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<sup>1</sup> Employer received twelve denied applications. In *Employer’s Brief*, Employer noted it was not aware of any consolidation of the matters and “would have opposed consolidation as the facts in each case are quite different AND the issuance of one decision may prejudice individual applications.” *Emp. Bf.* at 1, fn. 1. I have reviewed each of Employer’s applications that are on appeal before me, and determined each involves different locations across the United States, different occupations, and different responsive documentation to the CO’s Notices of Deficiency. Therefore, I will render a decision in each case.

<sup>2</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

and receive labor certification from the U.S. Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 C.F.R. § 214.2(h)(6)(iii). A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien labor Certification Appeals (“BALCA”). 20 C.F.R. § 655.61(a).

### **Background**

Employer is a building materials and construction services business. (AF 104).<sup>4</sup> On December 15, 2017, Employer filed its Form 9142 seeking twelve full-time, peakload Truss Assemblers<sup>5</sup> for the period of April 1, 2018 to December 15, 2018. (AF 95-104). Employer’s Statement of Temporary Need stated:

Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1<sup>st</sup> to December 15<sup>th</sup>, during which time we need to substantially supplement the number of workers for our labor force for these positions. As is well known, Nevada winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predictable, and it is possible for us to predict that these dates are regularly when the coldest and slowest part of the season will be. These winter dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these winter months (we do however continue to employ some year round workers). Our temporary peak load workers are only needed during our busy season and do not become a part of our permanent labor force. Due to the nature of our work we are unable to engage in much business during the winter months, of approximately December 15<sup>th</sup> to April 1<sup>st</sup>, because the cold and wet weather is not conducive to construction work. . . . Our business is directly tied to the construction industry. Since construction in general slows down during the winter months due to the cold and wet weather and the holidays, the need for laborers is substantially reduced since, in our experience, the home builders and construction companies do not purchase as much product during the winter months when they are not building as much.

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<sup>3</sup> On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

<sup>4</sup> Citations to the Appeal File are abbreviated as “AF” followed by the page number.

<sup>5</sup> The standard occupational classification title was listed as “Sawing Machine Setters, Operators, and Tenders, Wood,” SOC code 51-7041. (AF 114).

(AF 104). Employer stated further that it was not including additional supporting documentation with the application because the number of workers requested did not change substantially from the previous year's application, and the application was for the same period of need. *Id.*

On January 8, 2018, the CO issued a Notice of Deficiency ("NOD"), citing two deficiencies in Employer's application. (AF 89-94). First, the CO determined that Employer did not provide sufficient information "to establish its requested standard of need or period of intended employment," and cited 20 C.F.R. § 655.6(a)-(b). (AF 92). The CO wrote:

The employer explains that its peakload need is based on an increase in projects that will slow during the winter months. The employer indicates that during the winter months, it is unable to engage in much business, because the cold and wet weather is not conducive to construction work. However, the employer's work is done in Las Vegas, Nevada, which is relatively favorable to year-round outside work.

The employer's explanation of its temporary need points to an overall increase in its work projects which has resulted in its need for additional workers. However, it is not clear if the employer experiences a true peak in its business during its requested dates of need or if the employer experiences a lull in business during its requested dates of need and if the employer experiences a lull in business during its nonpeak dates, December 16 through March 31. Further explanation and documentation is needed to support its peakload need.

(AF 92).

To correct this deficiency, the CO directed Employer to submit the following additional documentation:

1. A description of the business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation and supporting documents that substantiate the employer's statement that it is unable to engage in much business, because the cold and wet weather is not conducive to construction work. This documentation can include supportive letters from building trade organizations in the employer's area of intended employment;
3. Summarized monthly payroll reports for a minimum of two previous calendar year[s] that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Truss Assembler*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise

does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

(AF 93).

The CO also cited a second deficiency, finding that Employer failed to establish temporary need for the twelve Truss Assemblers it requested on its application. *Id.* The CO cited the applicable regulations at 20 C.F.R. § 655.11(e)(3)-(4). To correct this deficiency, the CO directed Employer to submit the following:

1. An explanation with supporting documentation of why the employer is requesting 12 Truss Assemblers for its worksite in Las Vegas, Nevada during the dates of need requested;
2. If applicable, documentation supporting the employer's need for 12 Truss Assemblers, such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

(AF 94).

On January 19, 2018, Employer submitted its response to the NOD. (AF 25-88). Employer submitted documentation, including a statement, a graph of monthly new home closing trends for the Las Vegas area, a graph of weekly traffic and net sales per subdivision, a graph of its truss sales by month for 2017, a graph of monthly new home permits since 2015, a chart of its contracts for 2018, and a graph of the number of workers lost in Las Vegas since the 2008 recession. Employer also submitted job advertisements it placed by radio, newspaper, and online, as well as five letters of intent from home builders, payroll summaries for permanent and temporary employees for years 2014-2017, and several quarterly federal tax returns with wages and tax liability.

On February 28, 2018, the CO issued a Non-Acceptance Denial denying Employer's application for temporary labor certification because Employer failed to establish the job opportunity as temporary in nature and failed to establish temporary need for the number of workers requested. (AF 11-18). The CO determined that Employer did not submit sufficient

information “to establish its requested standard of need or period of intended employment.” (AF 13).

The CO wrote:

The employer states that its temporary need is based on projections and building schedules provided by its customers, general industry projections, and lack of available labor. The employer also stated that its business is tied directly to that of the builders’ fiscal year and labor. The employer was specifically asked to submit an explanation as well as supporting documents that substantiate the employer’s statement that it is unable to engage in much business because the cold and wet weather is not conducive to work. This document would provide support for the employer’s statement that “harsh winter weather conditions” cause the employer to not engage in much business. However, this document was not included in the employer’s NOD response, thus failing to support their claim. The weather in the areas of intended employment shows that the monthly average low temperatures during its nonpeak period do not fall below freezing and the highs in the nonpeak period are between 58 and 69 degrees.

As support for its peakload need, the employer equated their need with the growing home builder market but robust home sales shows a healthy housing market and does not point to a temporary need. The employer included a chart showing home closings per month and explains that buyers tend to move in the summer months. The employer notes that home buyers don’t tend to move during the colder months due to the weather and the holidays. However, it is not clear how home *sales* patterns support a temporary need for the building of the homes.

The employer also included a monthly new home permits chart. The source of the data or the locale that the data represents was not shown. It should be noted that building permits are valid for work to begin anytime within six months; and therefore, building permit data is not a useful tool in supporting specific dates of need.

The employer included its payroll reports from 2014 to 2017. The employer’s payroll reflects a robust temporary workforce year-round. For instance, the 2016 payroll reports show a range of 6 to 19 temporary workers employed during the dates outside of the requested period of need and the employer’s 2017 payroll reports reflect 14 to 23 temporary workers outside the requested dates. This pattern is found in the 2014 and 2015 payroll reports as well. It is unclear how the employer determined its peak-load need, as there is not only a staggered number of workers throughout the requested dates of need, but also a large number of both temporary and permanent employees year-round. The payroll shows a gradual increase in work hours starting in January and moving into the

year. However, it remains unclear if the employer has a temporary need for workers as a temporary use of workers does not alone establish a peakload need.

The employer again explained that its customers conduct the majority of their building during the warmer months which means demand for homebuilding follows a peak-load season from April 1 to December 15 with a decrease in demand from December 16 to March 31 due to colder weather and other western-related building constraints. The employer did not submit documentation to substantiate its stated reasons for the peakload need. The NOD suggested the employer could submit letters of support from building trade organizations in its area of intended employment; however, the employer did not provide any documentation to support its claims.

The employer included copies of its U.S. Corporate taxes and copies of its 2015 through 2016 quarterly federal tax returns; however, quarterly taxes represent the employer's entire organization including over 4000 employees and do not represent a particular occupation in a specific area of intended employment. Also, tax returns represent the annual income of the employer and offer no support for temporary need.

The employer submitted a contract summary; however, the work locations and beginning and ending dates of need of the specific projects that would support its date of need were not identified. The employer's contract summary did not support specific dates detailing when the projects would begin and end.

Additionally, the employer submitted letters of intent which generally stated that the peak months when the homebuilders will need seasonal labor to produce trusses are April 1, 2018 to December 15, 2018. However, the reason(s) for this peak in need is not indicated in the letters; and therefore, it is not clear if the peak in service is tied directly to the availability of the workers or an actual peakload need for the employer's services.

The employer also attributed its peakload to a labor shortage caused by the 2008 recession where the employer's area of intended employment saw a huge loss in construction workers. Furthermore, the employer submitted documents of job postings. The postings were for ongoing radio spots and in craigslist seeking framers/carpenters. The print advertisement indicated that the employer offers "stable work". These advertising documents represent a labor shortage rather than a peakload need. The employer is reminded that a labor shortage, no matter how severe, does not alone justify that an employer's underlying need for workers is temporary and not permanent.

The employer's response did not include documentation to substantiate its statements as to the cause of its peakload need including its statement regarding a construction schedule in the employer's area of employment. Therefore, the employer did not overcome the deficiency.

(AF 6-7).

The CO also determined that Employer failed to establish temporary need for the number of workers requested. (AF 16-17). The CO wrote:

In response to the NOD, the employer submitted a letter of explanation, payroll reports from 2014 to 2017 for Truss Assembler/Assembler Helpers, tax returns from 2014 through 2016, a contract summary, advertising information, expired Craigslist job postings, and letter of intent.

The employer was requested to but did not provide monthly summarized payroll reports from 2017 *specific* to the requested occupation. Instead, the employer submitted 2015 through 2017 payroll for both Truss Assemblers and Assembler Helpers.

The letters of intent generally stated that the peak months when the homebuilders will need seasonal labor to produce trusses are April 1, 2018 through December 15, 2018. However, the letters of intent do not explain the employer's specific need for 12 Truss Assemblers. It is not clear how the employer determined a specific need for the 12 workers during the requested dates of need.

The employer's quarterly payroll taxes were not reviewed as they represent the employer's entire organization with over 5,000 employees and are not exclusive to the position of Truss Assembler.

Therefore, the employer did not overcome the deficiency.

(AF 17-18).

On March 9, 2018, Employer requested administrative review of the CO's Final Determination/Non-Acceptance Denial. (AF 1). The case was docketed by the Board of Alien Labor Certification Appeals ("BALCA"), and I issued a *Notice of Docketing and Order Establishing Briefing Schedule* on March 20, 2018.

On March 29, 2018, Employer filed *Applicant's Brief on Appeal* (hereinafter "*Employer's Brief*"). Employer argues that "the CO failed to follow recent departmental guidance regarding the processing of renewal applications," and "the CO erred in her determination of the merits in virtually every critical respect." *Emp. Br.* at 1-2.

## Standard of Review

BALCA's standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *See Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy & Ed. Inc.*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Indus. Prof'l Servs.*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer's application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

## Discussion

Employer is required to establish that its need for the workers requested is "temporary." Temporary is defined by the regulation at 8 C.F.R. § 214.2(h)(6)(ii). That regulation states, in pertinent part:

(A) Definition. Temporary services or labor under the H-2B classifications refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) Nature of petitioner's need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(A)-(B).<sup>6</sup>

The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *Alter & Son Gen. Eng'g*, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015, slip

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<sup>6</sup> *See supra*, at fn. 1.

op. at 4 (Jan. 23, 2017). Pursuant to 20 C.F.R. § 655.6(a)-(b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need. An employer establishes a “peakload need” if it shows it “regularly employs permanent workers to perform the services at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017).

Employer applied for temporary labor certification for twelve Truss Assemblers on a “peakload” basis. In its response to the CO’s Non-Acceptance Denial, Employer asserted that its peakload need is based on three factors: 1) projections and build schedules provided by customers; 2) general industry projections; and 3) the lack of available labor. (AF 25). Employer provided documentation, including charts of its truss sales, data on new home permits and sales in subdivisions, data on the construction jobs industry in Nevada, job advertisements, letters of intent from clients, payroll summaries for years 2014 through 2017, and tax returns for years 2014 through 2016. (AF 31-85). Employer also included a summary of its contracts for 2018. (AF 31).

Employer’s sales data for 2017 shows that sales in January and February were the lowest for the year. (AF 27). The month of March had higher sales than April, and sales grew from April to June. *Id.* July had a notable sales drop, and sales peaked in August and slowly dropped through the end of the year. *Id.* Employer stated in its response that the Las Vegas residential housing market has increased by 14% year to year, and in 2017, there was an increase of 1,000 homes compared to 2016. (AF 25-26). Further, Employer provided data on net sales per subdivision, which shows there is a trend for higher home sales during the summer months than the winter months. (AF 26-27). Data for new home permits also supports that trend. (AF 28). Employer stated:

People tend to move during the summer months. Buyers like to be moved in before the new school year starts and before the holidays. Home buyers don’t tend to move during the colder months due to the weather and the holidays.

(AF 26).

In support of its peakload need period of April 1, 2018 to December 15, 2018, Employer submitted five letters of intent from clients. (AF 51-55). Each letter of intent states that the client’s need for Employer’s services is peakload from April 1, 2018 to December 15, 2018, and states the kind of services it expects Employer to provide. *Id.* Employer’s summary of contracts for 2018 provides that it is expected to provide over 550,000 hours of work for its clients in 2018, which includes over 234,000 hours of work specifically for contract types labelled “Truss,

Material, Labor.” (AF 31). Employer stated it has 150 jobs within 48 projects every month during its peakload period of need. (AF 28).

Employer’s payroll reports include the total amounts paid monthly to Truss Assemblers and Assembler Helpers as a group. (AF 56-59). Those amounts are separated based on permanent workers and temporary workers, along with the total hours worked by permanent and temporary workers. *Id.* The 2017 payroll report shows that the total payroll for the months of January and February were notably lower than the total payroll for the rest of the year. (AF 56). Total payroll increased significantly in March, dropped in April, and was the highest in June and September. *Id.* The 2016 payroll report shows a similar trend with January through March having the lowest total payroll, and July and September having the highest total payroll. (AF 57). The period from June to December had consistent total payroll amounts. *Id.* The report for 2015 was not significantly different trend wise, although October and November had the highest total payroll amounts. (AF 58).

It is also apparent from the payroll reports that the number of permanent and temporary employees has grown over time. Permanent employment has expanded from 6 employees in 2014 to 34 employees in 2017, and temporary employment has expanded from a peak of 16 employees in 2014 to a peak of 50 in 2017. (AF 56-59). Also, Employer’s tax returns for 2014 to 2017 demonstrate that the company as a whole has employed anywhere from 4,400 to approximately 6,500 employees during that time period. (AF 60-85).

In its appeal brief, Employer argues that the CO’s decision is “starkly at odds with the Department of Labor’s 2016 guidance regarding subsequent determinations of an employer’s previously certified temporary need and the evidence necessary to support such a subsequent determination.” *Emp. Br.* at 4. Employer bases this argument on *ETA’s Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating “Temporary Need”* (Sept. 1, 2016) (“Guidance”). The Guidance provides:

To reduce paperwork and streamline the adjudication of temporary need, effectively [sic] immediately, an employer need not submit additional documentation at the time of filing the Form ETA-9142B to justify its temporary need. It may satisfy this filing requirement more simply by completing Section B “Temporary Need Information,” Field 9 “Statement of Temporary Need” of the Form ETA-9142B. . . . Other documentation or evidence demonstrating temporary need is not required to be filed with the H-2B application. Instead, it must be retained by the employer and provided to the Chicago NPC in the event a Notice of Deficiency (NOD) is issued by the CO.

Employer argues that its application should have been certified based on the Guidance because it has a history of previously approved certifications, and has recurring peakload staffing needs. *Emp. Br.* at 7. Further, Employer argues that its application “explicitly noted that it was seeking ‘recertification’ to utilize ‘returning workers’” and its prior applications adequately explained its business and peakload need. *Id.* at 8. Employer argues that the CO’s failure to consider its history of applications, despite the Guidance’s directive, was arbitrary and

capricious. *Id.*

I have reviewed the Guidance and note that it is not a regulation. *See also Gordon Stone Co., LLC*, 2018-TLN-00083, slip op. at 5 (Apr. 16, 2018). Further, the regulation at 20 C.F.R. § 655.11(j) provides that “OFLC will announce in the **Federal Register** a separate transition period for the registration process, and until that time, will continue to adjudicate temporary need during the processing of applications.” (Emphasis in original). The Guidance may have been intended to streamline the processing of applications until an announcement is placed in the Federal Register, as provided by the regulations, but the Guidance should not be read with the rigid interpretation the Employer now argues.

Neither the Guidance nor the current regulations prohibit the CO from requesting additional information. *See Gordon Stone Co.*, slip op. at 5; 20 C.F.R. § 655.31(a). The Guidance provides:

If the job offer has changed or is unclear, or other employer information about the nature of its need requires further explanation, a NOD requesting an additional explanation or supporting documentation will be issued. . . . The issuance of prior certifications to the employer does not preclude the CO from issuing a NOD to determine whether the employer’s current need is temporary in nature. Likewise, inconsistencies between the employer’s written statements on the Form ETA-9142B with other evidence in the current or prior application(s) will cause the CO to issue a NOD.

Once the CO issued the NOD in this case, the burden was on the Employer to produce responsive documentation. The language in the Guidance is very broad regarding reasons the CO may issue an NOD. “The Employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.” 20 C.F.R. § 655.32(a); *Saigon Rest.*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

Moreover, certification is not guaranteed based on previous years’ approvals, and each application must stand on its own merits. Applications should reasonably be reviewed within the context of previous certifications where the CO concluded that the basic requirements for certification were met in the previous years. *Jose Uribe Concrete Constr.*, 2018-TLN-00044 (Feb. 2, 2018); *H & H Tile & Plaster of Austin, Ltd.*, 2018-TLN-00049 (Feb. 16, 2018). In reviewing this application and the appeal file, I find there are not any prior applications or sufficient data from those applications for me to consider this principle. Employer provided a list of 2017 application numbers in *Employer’s Brief*, but did not provide any copies or specific information regarding those applications; therefore, I cannot make any determinations based on previously filed applications. Even if I were able to consider Employer’s previously filed applications, the CO’s denial of certification would still be affirmed based on my findings below.

Employer’s payroll data is presented as a combination of Truss Assemblers and Assembler Helpers. The CO specifically requested the payroll data for the occupation specified in the application, which in this case is Truss Assemblers. Without the data for the Truss

Assembler occupation only, the CO was not able to determine whether Employer's application met the requirements of the regulations for establishing temporary need. I agree with the CO on this point. While the Employer did submit some supporting documentation, including its client intent letters and a contract summary,<sup>7</sup> Employer did not carry its burden in establishing temporary need. Furthermore, nothing in Employer's response demonstrates how Employer determined its need for a total of twelve Truss Assemblers during its period of need. Employer submitted data in its payroll reports, but did not show how it determined the number of workers it needs. Also, the payroll data includes data for Assembler Helpers.

Employer also argues that "the CO's rationale for rejecting [the application] rested on her evaluation of a single phrase: the favorable weather condition in the location of the intended work." *Emp. Bf.* at 9. While it is true that the CO determined that Employer failed to substantiate its statements about the weather conditions in Las Vegas, and failed to submit any supporting documentation with regard to how weather conditions affect its peakload need, it was only one point made by the CO out of several, as previously discussed.

For the reasons discussed above, I find that the Employer has not met its burden of showing how its employment need is temporary in nature based on peakload need. Further, I find that Employer has not met its burden of showing that the number of Truss Assembler positions requested and the period of need from April 1, 2018 through December 15, 2018 are justified. Therefore, I find the CO's determination was neither arbitrary nor capricious. Accordingly, I find that the denial of Employer's H-2B certification is affirmed.

### **ORDER**

Accordingly, it is hereby **ORDERED** that the Certifying Officer's denial of the Employer's *Application for Temporary Employment Certification* is **AFFIRMED**.

For the Board:

LARRY S. MERCK  
Administrative Law Judge

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<sup>7</sup> I note that the contract summary does not have start and end dates for each contract, and it also does not include any breakdown of how much of the contract is expected to be completed on a monthly basis or how many workers are going to be working on a particular contract. It does not provide any information that helps support Employer's temporary need or period of need.